# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

Number 1318

W. COMER DAVIS, REESE PERRY and JOHN C. TOWNLEY, as Tax Assessors of Fulton County, Georgia, GUY MOORE, as Tax Receiver of Fulton County, Georgia, T. E. SUTTLES, as Tax Collector of Fulton County, Georgia, and STANDISH THOMPSON

vs.

THE PENN MUTUAL LIFE INSURANCE COMPANY.

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

and

## SUPPORTING BRIEF.

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**Statutes Cited.**

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vs.

THE PENN MUTUAL LIFE INSURANCE COMPANY.

## PETITION FOR WRIT OF CERTIORARI

**To the Supreme Court of the State of Georgia.**

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, W. Comer Davis, Reese Perry and John C. Townley, in their capacity as members of the Board of Tax Assessors of Fulton County, Georgia, Guy Moore, in his capacity as Tax Receiver of Fulton County, Georgia, T. E. Suttles in his capacity as Tax Collector of Fulton County, Georgia, and Standish Thompson, respectfully pray that a writ of certiorari issue to the Supreme Court of the State of Georgia to review a final judgment of that Court entered (after motion for rehearing) the 6th day of February, 1947. A certified transcript of the record in the case, including the proceedings in the Supreme Court of the State of Georgia, accompanies this petition in accordance with the rules of this Court.

## I.

## SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

This petition involves the following questions:

1. Did the Supreme Court of Georgia commit error in holding that the Federal system of States places the intangible property sought to be taxed in this case outside the orbit of the taxing power of the State of Georgia?

This first question is so stated because the decisions of the State court in this case (198 Ga. 550, 32 S. E. 2d 180, and 41 S. E. 2d 406) clearly show that the Supreme Court of Georgia considered itself forbidden to permit the taxation of Penn Mutual's credits by its construction of limitations imposed by the Federal system.

2. Do the Georgia Supreme Court decisions requiring taxation of every species of property subject to the jurisdiction of Georgia, including accounts receivable, stocks and bonds and credits secured by real estate belonging to other non-residents and particularly the State court's decision requiring the taxation of credits owned by Northwestern Mutual Life Insurance Company when laid alongside this decision of the State court exempting similar credits of The Penn Mutual Life Insurance Company create an issue of discrimination cognizable under the Fourteenth Amendment to the Constitution of the United States?

In this connection we expect to show in this petition and the supporting brief that the decision of the Supreme Court of the United States denying certiorari in the Northwestern Mutual case (No. 653, October Term, 1946) was rendered January 6, 1947, and the decision of the Supreme Court of Georgia in this Penn Mutual case was first ren-

dered (before entertainment of motion for rehearing) on January 9, 1947.

3. Does Georgia's constitutional definition of a republican government as a government which places the sovereign right of taxation beyond the power of any department of the State government to limit or impair give rise to a substantial Federal question when that form of government as so defined by the State Constitution is impaired by the decision of a State Court created by that Constitution?

4. Does the State of Georgia have jurisdiction to tax credits secured by first mortgages on Georgia land, when those credits and the mortgages which secure same are owned by a non-resident of Georgia?

5. If a resident of Georgia borrows money from a party residing in another State, and as security therefor gives such non-resident a first mortgage on Georgia land, do the tax officials of the county where the debtor resides and the land is located have authority to assess against the intangible property evidenced by such mortgage a uniform ad valorem tax required by the State Constitution to be levied and collected on all property of every character, including the particular species of property so owned by the non-resident?

The case must be approached in light of the requirements of the Constitution of Georgia requiring the taxation of all property, this requirement being most clearly expressed in the following language of a unanimous decision of the Supreme Court of Georgia, to wit:

> "Thus apart from the permitted exemptions, the Constitution evinces an intention that no property which is subject to taxation in this State shall be relieved therefrom, and the statutes quoted express

> with equal certainty an intention by the lawmakers to lay a tax upon all property of every kind or class which the State of Georgia has jurisdiction to tax, nothing excepted."

Quotation from Suttles v. Northwestern Mutual Life Insurance Company, 193 Ga. 495, Opinion 506, 19 S. E. 2d 396, Opinion 403, 404.

The questions arose in a petition in equity filed by The Penn Mutual Life Insurance Company in the Superior Court of Fulton County, Georgia, against W. Comer Davis et al., Tax Assessors of Fulton County, Georgia, and other tax officials of said county (T. 1). The Penn Mutual Life Insurance Company (hereinafter referred to as "Penn Mutual") sought to enjoin the collection of ad valorem taxes on certain mortgage credits (denominated in Georgia law as "credits secured by real estate") owned by Penn Mutual, a non-resident corporation, on the effective tax date (which was January 1st) of each of the years 1931 to 1937, inclusive, the injunction being sought on the ground that the location and situs of said intangible property had at all times been and was in the State of Pennsylvania, the regular domicile of Penn Mutual; that the notes which evidenced said property had not at any time been "held, possessed, used or controlled within the State of Georgia by any agent or officer of Penn Mutual," and that the taxation of said intangible property by the defendant tax officials, if permitted, would deprive Penn Mutual of its property without due process of law contrary to the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, and also the due process clause of the Constitution of the State of Georgia.

The case was twice appealed to the Supreme Court of Georgia.

The first appeal (198 Ga. 550) was by the tax officials to an adverse decision on demurrer. Inasmuch as this first decision of the State Supreme Court was not a final judgment, review by the Supreme Court of the United States had to await final judgment of the State Supreme Court. Exceptions pendente lite were seasonably filed to this prior judgment.

Judgment upon the second appeal to the State Supreme Court (41 S. E. 2d 406) was final.

This final judgment of the highest court of the State overruled a motion for a new trial by defendant tax officials, affirmed an adverse decision on demurrers renewed to an amendment offered by Penn Mutual on the day of trial before a jury, and decreed a perpetual injunction against taxes sought to be assessed.

Prior to the verdict and judgment in the trial court, Penn Mutual had eliminated by amendment all issues of discrimination (T. 23). By final amendment allowed immediately prior to jury trial (T. 65) Penn Mutual completely restated its case. Thereupon, defendant tax officials renewed their general demurrer to the amended petition (T. 70) and the renewed demurrer was overruled (T. 71). The parties thereupon went to trial before a jury (as provided by law in Georgia, in the trial of equity cases), and the trial court directed a verdict against the tax officials and perpetually enjoined the assessment of property sought to be taxed.

On the second appeal to the State court (41 S. E. 2d 406), the tax officials who were plaintiffs-in-error complained of both the judgment on the renewed demurrer (T. 71), the verdict of the jury (T. 72), the judgment of the trial court thereon (T. 72), and order of the trial court overruling the motion for new trial (T. 147). This motion

for new trial was made by the tax officials who are petitioners in this certiorari in which petitioners in certiorari seek to review all of the adverse judgments above named.

On the issue of taxability, which was the sole issue in the case, the facts are not in dispute and may be briefly summarized as follows:

**Origin of Property Sought To Be Taxed.**

Details regarding the origin of property sought to be taxed and the method by which Penn Mutual acquired this property appear from Penn Mutual's last amendment (T. 65) taken in connection with the brief of evidence, which supplies numerous facts not pleaded by Penn Mutual.

By stipulation and agreement (T. 83), the Jacob Batt mortgage was taken as a sample of the procedure by which all mortgages of Penn Mutual covering Fulton County real estate were made.

That procedure was as follows:

For more than twenty years prior to the date of trial Penn Mutual had had a salaried Loan Supervisor in Fulton County, Georgia, whose office in the county was provided by Penn Mutual. The rent and all office expenses were paid by Penn Mutual.

Lipscomb-Weyman-Chapman Company, an independent real estate broker with office in Fulton County, Georgia, had been loan correspondent of Penn Mutual in Fulton County during this same twenty-year period.

All mortgages owned by Penn Mutual covering real estate in Fulton County, Georgia, originated from applications submitted through this Fulton County loan correspondent. A resident of Fulton County, or a person own-

ing land in Fulton County, could not obtain a Penn Mutual mortgage on Fulton County land without first making application through this Fulton County correspondent. If an owner of Fulton County property went to the home office at Philadelphia to apply for a mortgage on land in Fulton County, Georgia, he was referred to Penn Mutual's Fulton County loan correspondent, because no other way was provided whereby one might secure a Penn Mutual mortgage on Fulton County land.

Two written agreements were required by the correspondent. One was an agreement in writing signed by the prospective borrower to pay the correspondent a commission on any loan that the correspondent might secure. This agreement was never sent to Philadelphia.

The second agreement was an official loan application on a Penn Mutual form. This form was furnished in quantities by Penn Mutual to the local correspondent for use in connection with loan applications to be submitted to Penn Mutual for acceptance or rejection.

If the correspondent submitted the application to Penn Mutual, the official application together with an inspection report prepared on an official Penn Mutual form and signed by correspondent, a blue print and picture of the property and a credit report were delivered by the correspondent to the Penn Mutual's salaried Loan Supervisor at the Loan Supervisor's office in Fulton County. Two pictures of the entrance to the Loan Supervisor's office appear in the brief of evidence.

Mr. Howard D. Graf, who had been Loan Supervisor in Fulton County for eighteen years prior to the trial, was trained at the home office in Philadelphia. (His predecessor [from 1907-1927] was at the time of trial Manager of Mortgage Loans and a member of the Finance Committee in Philadelphia.)

Mr. Graf's connection with the proposed mortgage is in part illustrated by Plaintiffs' Exhibit 27 in the brief of evidence (T.134), which is a thorough appraisal of the value of the property offered as security and of the prospective borrower as a credit risk. Every one of the mortgages sought to be taxed had undergone this inspection and appraisal by Mr. Howard D. Graf or his predecessor as Loan Supervisor before being submitted by him to Philadelphia.

All submissions to the home office in Philadelphia were from the Fulton County office of Penn Mutual's Loan Supervisor. The documents so submitted to the Finance Committee in Philadelphia and upon which the Finance Committee acted in accepting or rejecting the application were:

1. The report and analysis of the salaried Loan Supervisor.

2. The inspection report submitted to the Loan Supervisor by the correspondent.

3. The blue print, picture and credit report submitted by the correspondent to the Loan Supervisor in Fulton County.

Decision as to whether a prospective loan would be accepted or rejected was made by the Finance Committee in Philadelphia.

Information upon which the Finance Committee in Philadelphia acted in determining whether a loan would be made included the official Penn Mutual application, the report of Penn Mutual's Fulton County salaried Loan Supervisor, and the credit report; also, in most cases, a picture of the premises offered as security. These documents were obtained or prepared by the loan correspondent or the salaried Loan Supervisor, in the manner above stated.

Mr. George S. Moffett, Manager of Mortgage Loans at Philadelphia, testified that it was against the policy of the Penn Mutual, and would be illegal, for the Finance Committee in Philadelphia to approve a loan without the information contained in these documents.

If the Finance Committee approved a loan a letter was sent from Philadelphia to the law firm of Alston, Alston, Foster and Moise in Atlanta, Fulton County, Georgia, instructing these Fulton County attorneys to prepare an abstract of title to the property offered as security. This firm of Atlanta attorneys had examined the title and closed in Fulton County, Georgia, all of the mortgages of Penn Mutual which covered Fulton County real estate.

The first letter of instructions from Penn Mutual to this Atlanta law firm was in the form shown by Plaintiffs' Exhibit 9 (T. 119). This letter was signed in behalf of Penn Mutual by the Superintendent of Mortgages at Philadelphia and after enumerating instructions the letter closed with this statement to the Atlanta attorneys: "We rely upon you to see that we are fully protected at every point."

After the Atlanta attorneys examined the title, they forwarded an abstract of title, together with a note and loan deed signed by the prospective borrower, to Penn Mutual in Philadelphia for approval by the company's legal department there. Upon this approval being given, Penn Mutual returned to the Atlanta attorneys the approved note and loan deed, rent assignment (if any) and abstract, and also sent from Philadelphia to the Atlanta attorneys Penn Mutual's check payable jointly to the attorneys and the prospective borrower. This letter of transmittal contained final closing instructions and a copy of the letter appears in the brief of evidence, Plaintiffs' Exhibit 20 (T. 131).

This firm of Fulton County attorneys closed each loan in exact accordance with instructions given in this manner. The check so received from Philadelphia was endorsed by the prospective borrower and deposited by the attorneys in a bank account maintained in Fulton County in the name of the attorneys. The proceeds were disbursed by checks drawn on this account by the attorneys.

If the property was already subject to a previous mortgage, the prior mortgage was paid by the Atlanta attorneys by check drawn on this account. Instructions from Penn Mutual contained in Plaintiffs' Exhibit 20 required that a prior mortgage be paid off by the closing attorney at time of closing the Penn Mutual loan. If other clearances had to be made in order to give Penn Mutual a first mortgage, these clearances were made by the Atlanta attorneys and they were instructed by this letter from Philadelphia to do so.

The loan was closed in the Fulton County office of this Atlanta law firm. The new mortgage which read directly to Penn Mutual as mortgagee was sent to record by the Fulton County attorneys immediately after closing and the note was sent immediately to Philadelphia. After the loan deed was returned by the recording official to these attorneys, it was sent by them to Philadelphia.

The fee charged by the closing attorney and the fee of the real estate broker were each paid by the borrower.

The correspondent maintained a collection, insurance and tax service during the life of the mortgage, these duties being performed on instructions sent to the correspondent from Penn Mutual in Philadelphia. Collections by the correspondent of principal and interest on loans so made were deposited in a bank account maintained in the name of The Penn Mutual Life Insurance Company in a

bank in Fulton County, Georgia, upon which account checks were drawn by officers of Penn Mutual in Philadelphia.

Duties of the correspondent and of Mr. Graf, the salaried Loan Supervisor, with respect to renewals and extensions of existing mortgages covering Fulton County real estate were substantially the same as their duties above described in connection with new mortgages.

## II.

## JURISDICTION OF THIS COURT.

The basis of this Court's jurisdiction is Section 237 (b) of the Judicial Code [28 U. S. C. A., Sec. 344 (b)]. The judgment of the Supreme Court of Georgia sought to be reviewed was entered finally on February 6, 1947, when petitioners' ~~action~~ motion for rehearing was denied (T. 190), and this petition is filed within three months from the date of that judgment.

In petition for certiorari filed by Northwestern Mutual Life Insurance Company (No. 653, October Term 1946, Supreme Court of the United States), that company stated that the amount of tax involved in its case alone was approximately $287,000.00. This Penn Mutual case is one of about twenty-five similar cases still pending in the Superior Court of Fulton County, although in some cases the amount involved is not so large.

Careful reading of all cases which will be cited by the respective parties will convince the Court that failure to grant certiorari in this case may result in the taxation of the Northwestern Mutual's mortgages while all other non-resident mortgage holders similarly situated will escape taxation.

Because a new Constitution was adopted in Georgia in 1945, some references will include citations of both the old and new Constitution.

**How and When the Federal Question Was Raised.**

The original and renewed demurrers were each sufficient under Georgia practice to raise in the State Court the Federal Constitution grounds urged in this petition.

> Newman v. State, 101 Ga. 534, **Opinion 536**, 28 S. E. 1005, First Division of Opinion;
> Cook v. Kroger Baking & Grocery Co., 65 Ga. App. 141 (3), 15 S. E. 2d 531.

The issue of taxability on Federal grounds was also raised by the Fourteenth Paragraph of Plaintiff's petition (T. 4) and Penn Mutual's claim of exemption was denied by the original answer of each defendant.

This denial in the original pleadings also created an issue regarding the constitutional question so pleaded by Penn Mutual.

> Savannah Electric & Power Co. v. Hines, 37 Ga. 733 (2), 141 S. E. 818.

Also, the original answer of the Tax Assessors affirmatively pleaded the taxability of the property in question (T. 53).

Defendant's motion for new trial which was filed in the trial court was amended (T. 74). This amendment again raised most of the Federal questions urged in this petition for certiorari.

General assignment of error in each bill of exceptions was sufficient under the State practice to review each judgment on demurrer and also the order overruling the

motion for new trial. Error assigned in the second bill of exceptions "on each and all of the grounds contained in the original motion for new trial and in the amended motion for new trial" was a definite assignment of error upon all of the grounds contained in the amended motion (T. 74 to 82), some of which were constitutional grounds.

Nix v. Armour Fertilizer Works, 40 Ga. App. 745, 151 S. E. 561.

This petition for certiorari is based upon the fact that in each appeal to the State Supreme Court, Federal questions so raised were decided adversely to the tax officials who are petitioners in certiorari.

## III.

## THE QUESTIONS PRESENTED.

Five questions presented by the petition for certiorari are clearly stated in the opening paragraphs of this petition and will not be repeated here.

## IV.

## REASONS RELIED ON FOR ALLOWANCE OF WRIT.

**First.** First reason relied on is that each decision of the State Supreme Court (199 Ga. 550 and 41 S. E. 2d 406) discloses that the State Court decided this case as it did because of its construction of limitations imposed by the Federal System.

In each decision the State Court reiterated its previous rule that the State Constitution imperatively required the taxation of all property subject to the taxing power of the State.

Both Headnote 1 and the first division of the opinion in the first decision (198 Ga. 552-560) show that the Court's reference to the due process clause of the State Constitution is predicated upon the Court's construction of limitations imposed by overriding United States Court decisions construing the Federal Constitution.

The opening paragraph of the opinion in the second decision (41 S. E. 2d 410) discloses that there was no departure from this original interpretation of limitations imposed by Federal law.

Where a non-federal ground is so interwoven with Federal questions as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, the Supreme Court of the United States has jurisdiction.

State Tax Commission of Utah v. Vancott, 306 U. S. 511, **Opinion 514**, 59 S. Ct. 605, **Opinion 606**, 83 L. Ed. 950, **Opinion 952**;

Able State Bank v. Bryan, Governor of Nebraska, et al., 282 U. S. 765, **Opinion 773**, 51 S. Ct. 252, **Opinion 256**, 75 L. Ed. 690, **Opinion 701**.

"Where the State court does not decide against petitioner or appellant upon an independent State ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, the Supreme Court of the United States has jurisdiction to review the judgment if ~~is~~, as here, it is final."

State of Indiana ex rel. Anderson v. Brand, 303 U. S. 95, **Opinion 98**, 58 S. Ct. 433, **Opinion 445**, 82 L. Ed. 685, **Opinion 689**, 113 A. L. R. 1482, **Opinion 1484**.

**Second.** Second reason relied upon for allowance of the writ of certiorari is the gross inequality and discrimination that will result if Northwestern Mutual Life Insur-

ance Company, whose petition for certiorari has just been denied by the Supreme Court of the United States (No. 653, October Term, 67 S. Ct. 490, rehearing denied 67 S. Ct. 631) is the only one of the non-resident mortgage companies required to pay the identical taxes on the identical property assessed by the same tax officials for the identical years.

This case culminates a long struggle by the tax officials of Fulton County to erase the evils of discrimination, and to apply to all persons equally the provisions of the Georgia Constitution which, aside from permitted exemptions not material here, require the taxation of "all property which the State has jurisdiction to tax—nothing excepted." The history of this struggle has been written in the recent Northwestern Mutual decision, 37 S. E. 2d 786.

While another issue of discrimination pleaded in the Northwestern Mutual case depended to some extent on Northwestern Mutual's pleadings, the issue of taxability and taxpayer's pleading of the due process clause of the Fourteenth Amendment as related to jurisdiction to tax was identical with the same pleadings by Penn Mutual in this case.

It is a coincidence that the decision of the State Court in this Penn Mutual case was first rendered on January 9, 1947, only three days following denial by the Supreme Court of the United States of Northwestern Mutual's petition for certiorari. A motion for rehearing postponed until February 6, 1947 the effective date of the final decision to which this petition for certiorari is filed.

We consider the facts of this Penn Mutual case which are related in this petition under the heading, "Origin of Property Sought to be Taxed," to make out a stronger

case on the question of the State's jurisdiction to tax than the facts of the Northwestern Mutual in which this Court denied certiorari. This fact leads us to make the assertion that in our opinion failure of the Supreme Court of the United States to grant relief in this case will mean that the Northwestern Mutual Life Insurance Company is the only non-resident mortgage company required to pay tax in Georgia (as it has paid since this Court's decision), and all others similarly situated will go tax-free.

**Third.** Third reason relied upon for allowance of the writ is Georgia's constitutional definition of a "Republican Government" as related to the "Sovereign right of taxation."

Briefly stated, Georgia's Constitution since 1877 has defined the right of taxation to be a "sovereign right—(which) rightfully belongs to the people in all republican governments," forbids any department of the State government to "irrevocably give, grant, limit or restrain this right" and declares void any act whatsoever by the State government, or any department thereof, to effect any of these purposes.

The entire paragraph of the State Constitution containing this provision is found in Section 2-2401 of the Code of 1933 (Constitution of 1877) and Article 7, Section 1, Paragraph 1 of the Constitution of 1945 (Georgia Laws 1945, page 57).

The point here made is that the people of Georgia had the right under the Tenth Amendment to the Constitution of the United States to so define a "Republican Government" and when that government is so defined in respect to a field not preempted by Federal law, any act which destroys this "Republican government" will be redressed by the Supreme Court of the United States because of the

guarantee of a "republican form of government" contained in Article IV, Section IV of the Constitution of the United States.

Definitions of a "republican form of government" contained in previous decisions of the Supreme Court of the United States have been limited to the political aspects of that form of government, and the decisions have indicated that the definitions are not exhaustive.

> Minor v. Happersett, 88 U. S. (21 Wall) 162, **Opinion 175**, 22 L. Ed. 627;
> Duncan et al. v. McCall, 139 U. S. 449, **Opinion 461**, 11 S. Ct. 573, **Opinion 577**, 35 L. Ed. 219.

We are fully aware of previous rulings by the Supreme Court of the United States in questions presented under Article IV, Section IV of the Federal Constitution that the relief sought was political and not judicial.

> Pacific Telephone & Telegraph Company v. Oregon, 223 U. S. 118, Opinion 149, 150, 32 S. Ct. 224, Opinion 231, 56 L. Ed. 377, Opinion 385, 386;
> Luther v. Borden, 48 U. S. (7 Howard) 1, Opinion 42, 12 L. Ed. 581, Opinion 599;
> Coleman v. Miller, 307 U. S. 433, **Opinion 454, 455**, 59 S. Ct. 972, Opinion 982, 983, 83 L. Ed. 1385, Opinion 1397.

With respect to the reasoning behind these decisions, the Court said in Coleman v. Miller, supra (Opinion, 307 U. S. 454):

> "In determining whether a question falls within that category (political relief), the appropriateness under our system of government of attributing finality to the action of the political department and also the lack of satisfactory criteria for a judicial determination are dominant considerations."

By contrast, the reach of a State's sovereign power, as respects the right of taxation, is a justiciable question

under the Federal system and under all decisions of the United States Supreme Court. At the inception of this suit Plaintiff's petition challenged the threatened tax as beyond the scope of the State's taxing power and accordingly violative of the due process clause of the State Constitution.

The judicial standards which were lacking in cases above cited where relief was denied under Article IV, Section IV of the Federal Constitution are present in this case. Accordingly, in this case where the State's Constitution defines a "republican government" in a respect which is justiciable as distinguished from political Plaintiffs-in-Error as tax officials claim the protection of Article IV, Section IV, when the justiciable right so defined has been, as they contend, unlawfully restricted.

**Fourth.** The right of the State officials to petition the Supreme Court of the United States for review of an adverse decision of a Federal question which affects their performance of duty is well established by decisions of the United States Supreme Court.

For a complete analysis of decisions in point, see

> Coleman v. Miller, 307 U. S. 433, **Opinion 443, 444**, 59 S. Ct. 972, **Opinion 977, 978**, 83 L. Ed. 1385, **Opinion 1391.**

Wherefore, petitioners respectfully pray that a writ of certiorari issue under the seal of this Honorable Court, directed to the Supreme Court of the State of Georgia, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Supreme Court of Georgia had in the case numbered 14902, entitled on its docket, "W. Comer Davis, John C. Townley, Reese Perry, as members of the Board of Tax Assessors of Fulton County, Georgia,

Standish Thompson, as Attorney for the Board of County Tax Assessors, Guy Moore, as Tax Receiver of Fulton County, Georgia, and T. E. Suttles, as Tax Collector of Fulton County, Georgia, as Plaintiffs in Error, v. The Penn Mutual Life Insurance Company, as Defendant in Error;" and also a full and complete transcript of the record and of the proceedings of said Supreme Court of Georgia had in the case numbered 15638, entitled on its docket, "W. Comer Davis, Reese Perry and John C. Townley, in their capacity as members of the Board of Tax Assessors of Fulton County, Georgia, Guy Moore in his capacity as Tax Receiver of Fulton County, Georgia, T. E. Suttles, in his capacity as Tax Collector of Fulton County, Georgia, and Standish Thompson, as Plaintiffs in Error, v. The Penn Mutual Life Insurance Company, as Defendant in Error," to the end that this case may be reviewed and determined by this Court, as provided for by the statutes of the United States and that each of said judgments of said Supreme Court of Georgia be reversed, and that petitioners have such other relief as to this Honorable Court may seem proper.

Respectfully submitted,

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# BRIEF

## In Support of Petition for Writ of Certiorari.

### OPINIONS BELOW.

The first opinion of the Supreme Court of Georgia to which exception is taken is reported 198 Ga. 550, 32 S. E. 2d 180, and appears in the record at pages 28 to 42.

The final opinion of the Supreme Court of Georgia on the second appeal to which exception is taken has not yet been published in the official reports of the Supreme Court of Georgia but is published in the Advance Sheets of the Southeastern Reporter (41 S. E. 2d 406) and is set out in the record at pages ~~151~~ 158 to 171.

### JURISDICTION.

A full statement of the grounds on which it is claimed that the Supreme Court of the United States has jurisdiction is contained in Section II of the petition for writ of certiorari, and the same is hereby adopted and made a part of this brief.

### STATEMENT OF THE CASE.

The facts in this case are set out in Section I of the petition for writ of certiorari and the statement there made is hereby made a part of this brief.

## SPECIFICATION OF ERRORS.

Petitioners assign error on the judgments of the Supreme Court of Georgia on the following grounds:

1. In holding that the Federal system of States deprives the State of Georgia of jurisdiction to tax the intangible property in question.

2. In holding that Georgia does not have jurisdiction to tax credits secured by first mortgages on Georgia land, when those credits and the mortgages which secure same are owned by a non-resident of Georgia.

3. In applying the law unequally to Northwestern Mutual Life Insurance Company which was required by the Supreme Court of Georgia to pay the same taxes for the same years under substantially the same circumstances, while relieving The Penn Mutual Life Insurance Company which was a non-resident owner of the same species of property of liability therefor and perpetually enjoining petitioners from applying the tax laws equally to the two taxpayers similarly situated.

4. In denying or limiting a "republican government" as that form of government is constitutionally defined by the Constitution of Georgia with respect to the right of taxation. Petitioners aver that it was within the power reserved to Georgia as a State in the Federal Union, to define a "republican form of government" in respects which have not been foreclosed by the Constitution of the United States, that Georgia did exercise this power by declaring that the taxing power had certain attributes in a "republican government," that the taxing power as so defined has been limited and circumscribed by the State Court's judgment in a manner forbidden by

the State Constitution and that accordingly petitioners have the right to ask relief under the first clause of Article IV, Section IV of the Constitution of the United States which guarantees to each State in the Union a "republican form of government."

## SUMMARY OF ARGUMENT.

A synopsis of the argument is set forth in the index and for the sake of brevity is omitted here.

## ARGUMENT.

1.

**The United States Supreme Court has held in an unbroken line of controlling decisions that the State of debtor's domicile has jurisdiction to tax intangible property evidenced by the obligation of a resident debtor to a non-resident owner.**

The unanimous decision in the case of Liverpool and London and Globe Insurance Company v. Board of Assessors for the Parish of Orleans (decided May 15, 1911), 221 U. S. 346, 31 S. Ct. 550, 55 L. Ed. 762, involved the power of a State to tax premiums of insurance due by residents to a non-resident insurance company which had been extended but not evidenced by written instrument. A statute of Louisiana required their taxation.

The first three headnotes of the decision in the Supreme Court of the United States are as follows:

> "Credits on open account are incorporeal and have no actual situs, but they constitute property and as such are taxable by the power having jurisdiction.
>
> "The maxim of mobilia sequuntur personam yields to the fact of actual control; and jurisdiction to tax intangible credits exists in the sovereignty of the debtor's domicile, such credits being of value to the creditor because of the power given by such sovereignty to enforce the debt. Blackstone v. Miller, 188 U. S. 205. Such taxation does not deny due process of law.
>
> "The jurisdiction of the State of the domicile over the creditor's person does not exclude the power of another State in which he transacts his business to tax credits there accruing to him from resident debtors, and thus, without denying due process of

law, to enforce contribution to support the government under whose protection his affairs are conducted."

On the immediate question involved in this case the Supreme Court of the United States said (Opinion 221 U. S. 354 and 355):

"The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor and is of value to the creditor because he may be compelled to pay; and power over the debtor at his domicile is control of the ordinary means of enforcement. Blackstone v. Miller, 188 U. S. 205, 206. Tested by the criteria afforded by the authorities we have cited, Louisiana must be deemed to have had jurisdiction to impose the tax. The credits would have had no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; the sums were payable by persons domiciled within the State, and there the rights of the creditor were to be enforced. If locality, in the sense of subjection to sovereign power, could be attributed to these credits, they could be localized there. If, as property, they could be deemed to be taxable at all, they could be taxed there."

Blackstone v. Miller (1903), 188 U. S. 189, 47 L. Ed. 439, 23 S. Ct. 277, permitted New York to tax the transfer of debts owed by New York citizens to a decedent who died domiciled in the State of Illinois, although Illinois had taxed the entire succession.

In the opinion of Blackstone v. Miller, 188 U. S. 189, **Opinion 205, 206**, the Supreme Court of the United States said:

"What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. Most

of us do not commit crimes, yet we nevertheless are subject to the criminal law, and it affords one of the motives for our conduct. So again, what enables any other than the very creditor in proper person to collect the debt? The law of the same place. To test it, suppose that New York should turn back the current of legislation, and extend to debts the rule still applied to slander, that actio personalis moritur cum persona, and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitutional consideration on one side, it is plain that the right of the foreign creditor would be gone.

"Power over the person of the debtor confers jurisdiction, we repeat. And this being so, we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the state at the time of the death. The maxim, mobilia sequuntur personam, has no more truth in the one case than in the other. When logic and the policy of a state conflict with a fiction due to historical tradition, the fiction must give way."

The doctrine of Blackstone v. Miller is a very old doctrine, recognized among others in the unanimous opinion of the Supreme Court of the United States in

Tappan v. Merchants' National Bank, 86 U. S. 490, 22 L. Ed. 189.

In the Tappan case the Court said with respect to the taxation in Illinois of shares in a national bank owned by a non-resident (Opinion 86 U. S. 503):

"It must be borne in mind that all this property, intangible though it may be, is within the State. That which belongs to residents is there by reason of their residence. All the owners have submitted themselves to jurisdiction of the State, and they must obey its will when kept within the limits of constitutional power."

The test for State taxability applied by the Supreme Court of the United States is:

> "Whether the taxing power exerted by the State bears fiscal relation to protection, opportunities and benefits given by the State. The simple but controlling question is whether the State has given anything for which it can ask return."
>
> State of Wisconsin v. J. C. Penney Co., 311 U. S. 435, **Opinion 444**, 61 S. Ct. 246, **Opinion 250, Col. 1**, 85 L. Ed. 267, **Opinion 270.**

The doctrine of the early Supreme Court of the United States decisions was departed from by that Court for a while, but has been recently reinstated by the decision of the Supreme Court in

> State Tax Commission of Utah v. Aldrich et al., Administrators, 316 U. S. 174, 62 S. Ct. 1008, 86 L. Ed. 1358, 139 A. L. R. 1436.

State Tax Commission of Utah v. Aldrich, 316 U. S. 174, supra, upheld the power of a corporation's domicile to impose an inheritance tax in respect of stock in a domestic corporation owned by a non-resident decedent. Commenting on this decision, A. L. R. states (case note 139 A. L. R. p. 1461):

> "It is clear that the decision of this Aldrich case will not be confined to taxation of foreign-owned corporation stock by the State of the corporation's domicile, but will be extended, when the occasion arises for decision, to taxation by the debtor's domicile of foreign-owned credits."

2.

**The two decisions of the Supreme Court of Georgia in this Penn Mutual case both show that they are based upon a misconception of limitations imposed by the Federal system.**

In the first Penn Mutual decision, 198 Ga. 550, 325 S. E. 2d 180, the entire first headnote of the decision is as follows:

> "The determining factor in the taxability of intangibles, as of tangibles, is territorial jurisdiction of the taxing sovereignty. The want of power to tax property outside the territorial jurisdiction is an inherent limitation on the power to tax. This State, having no external sovereignty under our federal system, cannot exercise jurisdiction or authority over persons or property without its territory, and 'cannot tax where it has jurisdiction over neither the owner nor the property.' To do so would violate the due process clause of our State constitution."

Particular attention is called to the language of the third sentence of this first headnote, namely:

> "This State, having no external sovereignty under our Federal system, cannot exercise jurisdiction or authority over persons or property without its territory, and 'cannot tax where it has jurisdiction over neither the owner nor the property.' "

Comparison of the first headnote above quoted with the first division of the opinion (198 Ga. pp. 552-560, 32 S. E. 2d 181 to 185) discloses that the want of power under the State Constitution was predicated upon the limits imposed by the Federal system.

This Federal basis for the Court's decision on this first appeal clearly underlies every ruling made by the

Supreme Court of Georgia, the Court stating in its opinion (198 Ga. 553, S. E. 2d 181):

> "The lack of extra-territorial power inheres in our Federal system, where the separate States and the people within them have surrendered a portion of sovereignty to the national government. It is well established that States, having entered into the Union, are not now possessed of external sovereignty."

Careful reading of the final decision of the Supreme Court of Georgia (which appears on pages 158 to 171 of the transcript) shows that the same conception of the limitations of the Federal system underlies every ruling there made by the State court regarding taxability of the property in question.

For instance, in the opening paragraph of this last State court opinion (T. 165), the Court refers to the fact that:

> "When this case was first here in Davis v. Penn Mutual Life Insurance Company, 198 Ga. 550, * * * we held that the allegations of the petition as it then stood were sufficient as against general demurrer to show the credits sought to be assessed * * * had no situs for such taxation in Fulton County, Georgia. * * * If the amendment last allowed has so completely changed the petition that it now shows that the credits of the plaintiff have a tax situs for State and county purposes in Fulton County, then it was error, of course, to overrule the renewed general demurrer, otherwise not."

In numbered Paragraph 1 of this last State court opinion (41 S. E. 2d 411), the Georgia Supreme Court cites the provision of the Constitution of Georgia requiring the taxation of all property and without dissenting from the universal rule in Georgia that requires taxation of all property which the State has jurisdiction to tax, deems

itself bound, as we believe, erroneously by limitations inherent in the Federal system. (See portion of Opinion, Davis, et al. v. The Penn Mutual Life Insurance Company, 198 Ga., pp. 552, 553, and quotation from Cooley on Taxation [4th Ed.] Section 92.)

The language of this decision (Davis et al. v. The Penn Mutual Life Insurance Company, 198 Ga. Opinion, pp. 552, 553), referred to last above, shows, as we believe, that the Court did not depart from its original decision (198 Ga. 550, supra) holding that the requirements of the State Constitution that all property should be taxed could not apply because of limitations imposed by the Federal system.

That this is true clearly appears from that portion of the last opinion (T. .., 41 S. E. 2d 411) which reads as follows:

> "The constitutional provision of force during the period involved in the instant case is:
>
> > "'All taxation shall be uniform upon the same class of subjects and ad valorem part of property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.'"

Neither decision of the Supreme Court of Georgia in this Penn Mutual case shows any departure from an unbroken line of cases holding that the language of the Constitution of Georgia above quoted requires the taxation, without exception, of every species of property of which the State has jurisdiction to tax, with the sole exception of property exempted from tax because of provisions of the State Constitution not material to this case.

Accordingly, we turn to the Georgia cases construing the requirements of the State Constitution in this respect.

3.

**The Constitution of Georgia during the years in question imperatively required the taxation of all property and forbade the exemption of property here assessed.**

Georgia adopted a new Constitution during the year 1945 which is published Georgia Laws 1945, pages 9 to 89, inclusive.

Also, during the year 1937, the previous State Constitution of 1877 was amended by an amendment ratified by the people on June 8, 1937 to authorize the General Assembly to classify property including money for taxation, and to adopt different rates and different methods for different classes of such property.

> Georgia Laws 1937, page 39, Annotated Code of 1933, Pocket Part, Section 2-5001.

The second decision of the Supreme Court of Georgia in this case recognized that this suit which was filed October 22, 1937 did not involve this 1937 amendment authorizing the classification of property.

The taxes in question were uniform ad valorem taxes for the years 1931-1937, inclusive, and effective tax date in Georgia was January 1st of each of said years.

> Code of 1933, Section 92-6202.

With respect to the Georgia Constitution and laws which governed the liability of Penn Mutual for taxation, the opinion of the State court (T.166) says:

> "The question here presented must therefore be determined under the applicable provisions of the Constitution and laws of this State as they existed prior to June 8, 1937. The constitutional provision of force during the period involved in the instant case is:

> " 'All taxation shall be uniform upon the same class of subjects and ad valorem upon all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.' "

In the case of Suttles, Tax Collector et al. v. Northwestern Mutual Life Insurance Company, 193 Ga. 495, **Opinion 506**, 19 S. E. 2d 396, **Opinion 403, 404** (Certiorari denied by the Supreme Court of the United States, 67 S. Ct. 490, Rehearing denied, 67 S. Ct. 631), the Supreme Court of Georgia said:

> "Thus, apart from the permitted exemptions, the Constitution evinces an intention that no property which is subject to taxation in this State shall be relieved therefrom, and the statutes quoted express with equal certainty an intention by the lawmakers to lay a tax upon all property of every kind or class which the State of Georgia has jurisdiction to tax, nothing excepted."

This case of Suttles v. Northwestern Mutual Life Insurance Company involved the identical tax on the same species of property for the same years 1931-1937, inclusive, which is involved in this litigation.

The sections of the Georgia Constitution cited in the Northwestern Mutual opinion relating to the classes of property which may be exempted from taxation and forbidding the exemption of all other property, and the sections of the Georgia Code there cited are the identical sections relied on by petitioners in certiorari in this case.

The Georgia Constitution of 1877 (Article VII, Section II, Paragraph II, Code of 1933, Section 2-5002 and Section 2-5003) specified certain classes of property that the Legislature was authorized to exempt.

Likewise, the new Georgia Constitution adopted during the year 1945 (Article VII, Section I, Paragraphs IV and V, Georgia Laws 1945, pages 58-61) enumerates certain kinds of property which the Legislature is authorized to exempt. In each Constitution it is declared that "all laws exempting property other than that enumerated shall be void." It is sufficient here to say that property involved in this litigation is not in any exempt class.

The portion of the opinion of Suttles v. Northwestern Mutual Life Insurance Company above quoted is a complete summary of all Georgia law on the subject of requirements of the State Constitution with respect to the taxation of property.

The Supreme Court of the United States has construed the above quoted language of the Georgia Constitution to require taxation of all property.

> Wright, Comptroller General, v. Louisville & Nashville Railroad Company et al., 195 U. S. 219, **Opinion 221, 222**, 25 S. Ct. 16, **Opinion 17, 18**, 49 L. Ed. 167, **Opinion 168.**

The Supreme Court of the United States (citing Georgia State Building & Loan Association v. Savannah, 109 Ga. 63, 35 S. E. 67) regards, and the Supreme Court of Georgia has held, the provisions in the Constitution of Georgia which require taxation of all property to be self-executing.

> Georgia Railroad & Banking Company v. Wright, 124 Ga. 596, **Opinion 611**, 53 S. E. 251, **Opinion 258, Column 1**;
>
> Wright, Comptroller General, v. Louisville & Nashville Railroad Company et al., 195 U. S. 219, last paragraph in **Opinion, page 222**, 25 S. Ct. 16, **Opinion page 18**, 49 L. Ed. 167, **Opinion 168.**

Elder v. Home Building and Loan Association, 188 Ga. 113, **Opinion 116**, 3 S. E. 2d 75, **Opinion 77, 78**, applied the same sections of the Georgia Constitution and the Georgia Code to the credits evidenced by notes of a local building and loan association in Fulton County.

By statute enacted during the year 1927 and codified as Section 92-2407 of the Georgia Code of 1933, the Legislature had sought to exempt from taxation the credits all "mutual building and loan associations operating only in the counties of their charters, and limiting their loans to members."

Holding this statute unconstitutional, the Supreme Court of Georgia said:

> "The property here sought to be taxed is debts evidenced by notes, and is not embraced in the properties which the Constitution authorized the General Assembly to exempt from taxation. Such property is embraced in the personal property defined in the Code Section 92-102, as property subject to taxation. It follows that since the Code Section 92-2407 exempts from taxation property made subject to taxes by Section 92-102, supra, and since such property is not embraced in that which the Constitution authorized to be exempted from taxation, the statute offends the Constitution and is void."

Another unanimous decision of the Supreme Court of Georgia construing the same section of the same State Constitution is the case of

> Atlanta National Building & Loan Association v. Stewart, Tax Collector, 109 Ga. 80, **Opinion 96**, 35 S. E. 73, **Opinion 79, 80.**

The Atlanta Building & Loan Association case refers to the identical constitutional provisions and code sections

which are described in the Northwestern Mutual case by their new numbers in the Georgia Code of 1933.

Accordingly, if we should take these sections in the Atlanta Building & Loan Association case and give them the new numbers assigned to the identical sections in the Code of 1933, page 96 of the opinion of the Atlanta Building & Loan Association case (35 S. E., Opinion 79, 80) reads in part as follows:

> "In 1877 the people of the State held a constitutional convention—and a new Constitution was adopted which contained the following provisions:
>
> > " 'All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.' (Code of 1933, Sec. 2-5001.)
>
> "Section 2-5002 states what property the Legislature may exempt from taxation. Section 2-5002 provides that,
>
> > " 'All laws exempting property from taxation, other than the property herein enumerated, shall be void.'
>
> "Section 2-5006 provides:
>
> > " 'The power to tax corporations and corporation property shall not be surrendered or suspended by any contract or grant to which the State shall be a party.'
>
> "The language would seem to be plain, its purpose unmistakable, to require all property to be taxed not only uniformly, but ad valorem. It left no loophole to escape. There was to be no classifying of property; no exempt property except that specifically allowed to be exempted by the Constitution. The rule was absolute; property is taxed according to value."

The case which was cited by the Supreme Court of the United States in Wright, Comptroller General, v. Louisville & Nashville Railroad Company et al., 195 U. S. 219, supra, was

Georgia Building & Loan Association v. Savannah, 109 Ga. 63, 35 S. E. 67.

In the opinion of this case (109 Ga. 67) the Supreme Court of Georgia said:

> "It would be a work of supererogation at this late day to enter into a discussion, or cite authorities, to show that under the system of taxation prescribed by our constitution the property of all persons and corporations, unless exempted, is not only to be taxed but must be taxed on the basis of value. Under its provisions, property of every kind, real estate, money, choses in action, movables, are, as a rule, not only subject to tax but, taking value as a basis, subject to the same rate of tax; that is to say, the owner of land of the value of one thousand dollars must pay to the government, as a contribution for protection and support, the same number of dollars as the owner of personal property of the value of one thousand dollars pays—no more, no less; and property of all kinds is, by a proper interpretation of our statute, placed in one class as a subject of taxation."

Another Georgia case in which a city sought to exempt certain property from an ad valorem tax by expressly making a tax applicable to real estate only was the Georgia case of

Verdery v. The City of Summerville, 82 Ga. 138, **Opinion 140**, 8 S. E. 213, **Opinion 214.**

After citing the same provisions of the Constitution of 1877 which control in this case, the Supreme Court of Georgia there said:

> "Once for all, the constitution has enumerated the two classes of property, which enumeration the legis-

lature, the courts and the citizen must recognize as exhaustive; property, whatever its species, is simply exempt or subject to be taxed. If exempt, it pays nothing; if subject, the amount it shall pay is measured by multiplying the fixed rate into the actual value. The result will be, in every instance, that all persons who own taxable property of equal value will pay the same amount of taxes, and all who own more than others will pay more, and all who own less will pay less."

In Colgate-Palmolive-Peet Company v. Davis, 196 Ga. 681, 27 S. E. 2d 326, the Supreme Court of Georgia by unanimous decision applied the same sections of the Georgia Constitution and laws above quoted to require taxation of the accounts receivable of merchandise sold on interstate shipment from Jeffersonville, Indiana pursuant to orders solicited from a sales office in Atlanta, Fulton County, Georgia.

In Parke Davis and Company v. City of Atlanta, et al., 200 Ga. 296, **Opinion 305**, 36 S. E. 2d 773, Opinion 780, the Georgia Supreme Court by unanimous decision (one Justice disqualified) upheld the taxation by the City of Atlanta of accounts receivable of Parke Davis and Company, although all the orders were approved and contracts made outside the State.

4.

**Regard for constitutional equality requires that the Supreme Court of the United States grant certiorari in this case.**

The history of the long struggle of Tax Officials of Fulton County to put intangible property belonging to non-residents on the tax books is written in a similar case in which the Supreme Court of the United States denied certiorari on January 6, 1947 after the taxpayer

had been required to pay by judgment of the Supreme Court of Georgia.

> Northwestern Mutual Life Insurance Company v. Suttles, Tax Collector, et al., 38 S. E. 2d 786, Certiorari denied by Supreme Court of the United States on 1/6/47, 67 S. Ct. 490, Petition for Rehearing denied on 2/3/47, 67 S. Ct. 631.

This case culminates a long struggle by the tax officials of Fulton County to place on the tax books of the State and county many millions of dollars of intangible property which had escaped taxation prior to the commencement by the tax officials about the year 1935 of an effort to bring intangible property out of hiding.

> "If the agency is split into its several parts, nevertheless the sum of the parts adds up to the whole."

The Northwestern Mutual Life Insurance Company had a "loan agent" in Fulton County. The Penn Mutual Life Insurance Company had a "loan supervisor." Both were salaried representatives and both had an office and office force in Fulton County furnished by the respective companies who paid their salaries.

In the Northwestern Mutual case the loan agent received the local attorney's abstract of title and transmitted it to the home office, and when the abstract was approved in Milwaukee the check to borrower was sent to the loan agent and he delivered it. In the Penn Mutual case the loan supervisor preformed the identical services performed by Northwestern Mutual's loan agent except that he did not solicit applications for mortgages and except that Penn Mutual ordered the abstract to be made by an Atlanta attorney and delivered the check through the Atlanta attorney who made this abstract. This Atlanta attorney was responsible to Penn Mutual for examining the title and closing the loan. In both cases the fee of the examining attorney was paid by the borrower.

In each case the particular method of handling the making of mortgages resulted in many millions of dollars of mortgages made in the first instance to the non-resident insurance company, signed by citizens of Georgia and secured by real estate located in Fulton County. None of the mortages in either case were transferred.

In the Northwestern Mutual case the non-resident taxpayer was required to pay State and County taxes for the identical years that Penn Mutual has by judgment of the same Court been relieved from paying the same tax.

If the Court will carefully examine the facts of this case there are many respects in which this case is a much stronger case for local control than the Northwestern Mutual. For instance, in this case, two local Atlanta bank accounts were used in making and in collecting the mortgages while in the Northwestern Mutual case there was no local bank account at all.

In examining the record in a tax case it is the rule of the United States Supreme Court to disregard form and look to realities of control.

The Georgia Court's distinction between the two cases, on the basis of the facts involved, has the appearance of a distinction between tweedle-dee and tweedle-dum which, in our opinion, should be laid aside when basic principles of the scope of State sovereignty, equal protection and discrimination are challenged.

If the tax officials of Fulton County had assessed some non-residents and let others escape they would have been subject to a charge of discrimination.

Bohler v. Callaway, 267 U. S. 479, **Opinion 489**, 45 S. Ct. 431, **Opinion 436**, 69 L. Ed. 745, **Opinion 751.**

By the first Article of the Bill of Rights of both the old and new Constitution of Georgia, public officers are "trustees and servants of the people."

Constitution of 1877, Art. I, Sec. I, Code of 1933, Sec. 2-101;
Constitution of 1945, Art. I, Sec. I (Ga. Laws 1945, pages 9, 10).

In the Northwestern Mutual case (67 S. Ct. 490) in which the Supreme Court of the United States on January 6, 1947 denied certiorari, Georgia's Supreme Court commended the tax officials for their efforts to apply the law equally to all owners of intangibles (Opinion 38 S. E. 2d, pp. 801, 802).

Now, having been denied the right to assess another taxpayer similarly situated, and in their constitutional capacity as trustees and servants of the people, petitioners in certiorari respectfully request a review of the facts in this case in order that discrimination (which petitioners as public officers are bound to avoid) may not prevail. Petitioners are without remedy unless the Supreme Court of the United States comes to their assistance. The Court which would declare a tax void if petitioners practiced discrimination should come to the aid of petitioners in their effort to apply the law equally to all.

In this petition, petitioners are aided by the equity of their cause.

The First Bank Stock Corporation was a Delaware corporation doing business in Minnesota and the tax involved in First Bank Stock Corporation v. Minnesota, 301 U. S. 234, 57 S. Ct. 677, 81 L. Ed. 1061, was a property tax. That case related to Minnesota's right to levy a property tax on shares of stock. In that case the Supreme Court of the United States said (Opinion, 301 U. S. 241):

"The economic advantages realized through the protection at place of domicile, of the ownership of rights in intangibles, the value of which is made the measure of the tax, bear a direct relationship to the distribution of burdens which the tax effects. These considerations support the taxation of intangibles at the place of domicile, at least where they are not shown to have acquired a business situs elsewhere, as a proper exercise of the power of government.

"Like considerations support their taxation at this business situs, for it is there that the owner in every practical sense invokes and enjoys the protection of the laws, and in consequence realizes the economic advantages of his ownership. We cannot say that there is any want of due process in the taxation of the corporate shares in Minnesota, irrespective of the extent of the control over them which the due process clause may save to the states of incorporation."

The above quotation indicates that if either situs is to be preferred, that preference goes to the local state whose laws afford security and protection for the investments of the non-resident. Security for intangible rights and the priorities and enforceable remedies against local debtors are the most material elements which give value to intangible rights. These securities, priorities and enforceable remedies are, for all practical purposes, located exclusively in the forum of debtor's residence, or the State and county where the property covered by the mortgage is located.

The Supreme Court of North Carolina in the case of Redmond v. Rutherford, 87 N. C. 122, which is quoted in Armour Packing Company v. Augusta, 118 Ga. 552, **Opinion 555**, 45 S. E. 424, **Opinion 425**, said:

"The debts due to the plaintiffs upon their land contracts are personal estate, the same as if they were due upon notes or bonds; and so far as they have any substantial existence, they are in this State and not

elsewhere. Their validity and protection, and the remedies for their enforcement, all depend upon the laws of this State, and in neither respect (or in any other that we can now think of) do they take any benefit from the laws of the Plaintiffs' domicile.

"It is but just, therefore, that they should contribute towards the support of the only government which affords them protection, and help to defray the expenses incurred in so doing. The actual situs and control of the property within this State, and the fact that it enjoys the protection of the laws here, are conditions which subject it to taxation here; and the legal fiction, which is sometimes for other purposes indulged, that it is deemed to follow the person of the owner, and to be present at the place of his domicile, has no application."

In Adams Express Company v. Ohio, 166 U. S. 185, **Opinion 225**, 17 S. Ct. 604, **Opinion 608**, 41 L. Ed. 965, **Opinion 979**, the Supreme Court of the United States said in a unanimous opinion:

"Courts must recognize things as they are, and as possessing a value which is accorded to them in the markets of the world, and that no finespun theories about situs should interfere to enable these large corporations, whose business is carried on through many states, to escape from bearing in each state such local burden of taxation as a fair distribution of the actual value of their property among these states requires."

In Wisconsin v. J. C. Penney Co., 311 U. S. 435, **Opinion 444, 445**, 61 S. Ct. 246, **Opinion 250**, 85 L. Ed. 267, **Opinion 270**, the Supreme Court of the United States said:

"We cannot be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not the verbal weapons imported into it. 'Taxable event,' 'jurisdiction to tax,' 'business situs,' 'extraterritoriality' are all compendious ways of implying the impotence of state

power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."

5.

**The Constitution of Georgia declares the right of taxation to be a "sovereign right which belongs to the people in all republican governments" and forbids any department of the State government to limit or restrain this right.**

The above heading incorporates the portions of both the former and present Constitution of Georgia which attempt to define in this respect a "republican government."

The entire language of Article IV, Section I, Paragraph I of the Georgia Constitution of 1877 (Code of 1933, Section 2-2401) is identical with the entire language of Article VII, Section I, Paragraph I of the new Constitution of 1945 (Georgia Laws 1945, page 57).

That identical language is as follows:

"The right of taxation is a sovereign right—inalienable, indestructible—is the life of the State, and rightfully belongs to the people in all republican governments, and neither the General Assembly, nor any, nor all other departments of the government established by this Constitution, shall ever have the authority to irrevocably give, grant, limit, or restrain this right; and all laws, grants, contracts, and

all other acts, whatsoever, by said government, or any department thereof, to affect any of these purposes, shall be, and are hereby declared to be null and void, for every purpose whatsoever; and said right of taxation shall always be under the complete control of, and revocable by, the State, notwithstanding any gift, grant or contract, whatsoever, by the General Assembly."

In analyzing the above language, it will be observed that the people of Georgia have in their fundamental law accomplished, among other things, the following:

(a) Declared the right of taxation to be a "sovereign right—inalienable, indestructible—the life of the State,"

(b) Declared that the right of taxation "rightfully belongs to the people in all republican governments," and

(c) Forbids "the General Assembly, or any, or all departments of the government established by this (the State) Constitution * * * to irrevocably give, grant, limit, or restrain this (sovereign) right," and

(d) Declares void, for every purpose whatsoever, all laws, grants, contracts, and all other acts whatsoever, by any department of said government, to effect any of these purposes.

The courts of Georgia, including particularly the Supreme Court, constitute a department of the State government, established and deriving its authority from these same Constitutions.

Constitution of 1877, Article VI, Code of 1933, Sections 2-2901 et al.;
Constitution of 1945, Article VI, Georgia Laws 1945, pages 41 et seq.

6.

**A limitation imposed by the State court upon the sovereign right of taxation as defined by Georgia's Constitution, if contrary to that Constitution, gives rise to a justiciable, as distinguished from a political, question.**

This division of the brief relates to the section of Georgia's Constitution quoted and analyzed in Division 5 above.

In order to obtain relief in this petition for certiorari based upon this section of the State Constitution, the right secured must be justiciable as distinguished from political.

The quoted section of the State Constitution has received limited construction by the State Supreme Court and the protection sought here has never received attention by any decision of the highest court of the State.

For instance, Felton v. McArthur, 173 Ga. 465, **Opinion 470-472,** 160 S. E. 419, **Opinion 422 and 423,** held that the Legislature of Georgia was not prohibited by this section from fixing the order and priority of claims against insolvent banks.

In Georgia Railroad and Banking Co. v. Wright, 124 Ga. 596, **Opinion 627,** 53 S. E. 251, **Opinion 265,** the State Supreme Court held that this section of the State Constitution was not relevant to an act of the Legislature in prescribing a statute of limitation for the enforcement of tax executions.

Almand v. Pate, 143 Ga. 711, **Opinion 717,** 84 S. E. 909, **Opinion 911,** upheld an act of the Georgia Legislature establishing drainage districts as against a constitutional attack based upon the same section of the State Constitution. The State Court's opinion in this respect was

predicated in part upon the fact that the act creating drainage districts did not authorize the levy of a tax.

An analysis of the language of Section 2-2401 of the Code of 1933 (which is the portion of the State Constitution here relied on) discloses that all prohibitions contained in this section are of the same quality and the same degree. While the Georgia Supreme Court has construed this section of the State Constitution in cases where a particular act of the Legislature was challenged by a private citizen as denying a "republican government," the State court has never entertained a challenge by either a public official or a private citizen upon any act of either department of the State government as constituting an unlawful limitation upon the sovereign taxing power of the State.

The reach of a State's sovereign taxing power had been defined by the Supreme Court of the United States long before the adoption of the Georgia Constitution of 1877.

McCulloch v. Maryland, 17 U. S. (4 Wheaton) 316, 4 L. Ed. 579.

A State's power of taxation flows from its sovereignty and is not dependent for its scope on grants of authority in either the State or Federal Constitution. The provisions of Constitutions merely direct or limit the exercise of this sovereign tax power. In the absence of constitutional restraint, a State's power of taxation extends to all subjects over which the State is capable of demonstrating the practical effect of its power through its laws operating territorially within its borders.

McCulloch v. Maryland, 17 U. S. 316, supra.

The original bill filed in this case by The Penn Mutual Life Insurance Company sought relief from the tax

sought to be collected on the ground that the levy, if permitted, would violate the constitutional rights of Penn Mutual secured by the due process clause of both the State and Federal Constitutions.

Petitioners in certiorari are of the opinion that the section of the State Constitution quoted in division 5 of this argument both defines and declares the extent of the State's sovereign taxing power and secures to the people of Georgia the exercise of that power as defined by McCulloch v. Maryland, supra, and other Federal decisions which are cited in this brief.

The judicial power of the United States as defined in the Constitution is dependent on the nature of the case and the character of the parties.

> Bank of United States v. Deveaux, 9 U. S. (5 Cranch.) 61, 3 L. Ed. 38, reversing Fed. Cas. No. 916.

Other Supreme Court decisions illustrative of the exercise of the judicial power including the following rulings:

The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function.

> United States v. American Trucking Associations, 310 U. S. 534, Opinion 544, 60 S. Ct. 1059, 84 L. Ed. 1345.

Public use as respects application of constitutional provisions in case of expropriation of private property is a judicial question.

> City of Cincinnati v. Vester, 281 U. S. 439, Opinion 446, 50 S. Ct. 360, 74 L. Ed. 950.

Allowable limits of military discretion, and whether they have been overstepped by the Governor in a particular case to the extent of violating rights granted by the Federal Constitution are judicial questions.

> Sterling v. Constantin, 287 U. S. 378, **Opinion 401**, 53 S. Ct. 190, 77 L. Ed. 375.

The question whether an act has or has not been repealed, expressly or impliedly, is a matter of judicial and not of legislative determination.

> District of Columbia v. Hutton, 143 U. S. 18, **Opinion 27**, 12 S. Ct. 369, 36 L. Ed. 60.

The power to determine whether police power is being exercised under constitutional authority resides in the judicial branch of the government only.

> Constantin v. Smith (D. C. Texas 1932), 57 F. 2d 227, Opinion 238 (Appeal dismissed, Sterling v. Constantin, 287 U. S. 378, 53 S. Ct. 190, 77 L. Ed. 375).

The next division of this brief will deal with the question as to whether Georgia had a right to constitutionally define a "republican government."

If this right existed, then it is our opinion that United States Supreme Court and other Federal decisions above cited disclose that the right violated is judicial in nature rather than political. If the right is judicial, then it is entitled to protection by reason of the guaranty contained in Article IV, Section IV of the Constitution of the United States.

The portion of Article IV, Section IV of the Federal Constitution here relied on is the following language:

> "The United States shall guarantee to every State in this Union a republican form of government."

Keeping this Federal constitutional guaranty in mind, we shall now turn briefly to a consideration of these Federal decisions wherein relief has been denied because the relief sought was political. These contrary holdings include the following:

Whether a State has ceased to be republican in form within this guaranty, because of its adoption of the initiative and referendum, is a political question, solely for Congress.

> Pacific States Telephone and Telegraph Company v. State of Oregon, 223 U. S. 118, see **Opinion 149 and 150**, 32 S. Ct. 224, 56 L. Ed. 377.

Georgia's petition to restrain officers of the United States government from executing the "reconstruction acts" was held to raise questions which belong to the two great political departments of the government and accordingly not the subject of judicial cognizance.

> State of Georgia v. Stanton, 73 U. S. (6 Wall) 50, 18 L. Ed. 721.

The question of which of two opposing governments, each claiming to be the rightful government of a State, is the legitimate government, is not a question to be decided by the judicial tribunal of a State, but is to be determined by the political department.

> Luther v. Borden, 48 U. S. (7 Howard) 1, 12 L. Ed. 581.

The question of efficacy of ratification of a proposed Federal constitutional amendment by State legislatures, in light of a previous rejection or an attempted withdrawal, is a "political question" pertaining to the political departments, with ultimate authority in Congress in the exercise of its control over promulgation of the adoption of the amendment.

> Coleman v. Miller, 307 U. S. 433, 59 S. Ct. 972, 83 L. Ed. 1385, 122 A. L. R. 695.

Duncan v. McCall, 139 U. S. 449, 11 S. Ct. 573, 35 L. Ed. 219, was a habeas corpus case in which petitioner sought discharge because of alleged irregularity in the legislative procedure by which the statute under which he was convicted was enacted by the Legislature of Texas. Under these circumstances, the Court held that the question as to whether this State statute had or had not binding force by reason of compliance or non-compliance with the State Constitution was a question for the State courts to determine.

In Minor v. Happersett, 88 U. S. (21 Wall) 162, 22 L. Ed. 627, the question presented was whether since the adoption of the Fourteenth Amendment a woman who is a citizen of the United States and of a State within the United States is a voter in that State, notwithstanding the provisions of the Constitution and laws of the State which confined the right of suffrage to men alone.

With respect to the constitutional guaranty of a republican form of government, Minor v. Happersett (Opinion, 88 U. S. **175, 176**) said:

> "The guaranty necessarily implies a duty on the part of the States themselves to supply such a government. All the States had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. **These governments the Constitution did not change. They were accepted precisely as they were** and it is to be presumed that they were such as it was the duty of the State to provide. Thus, we have unmistakable evidence of what was republican in form, within the meaning of that term as employed by the Constitution." (Emphasis ours.)

7.

**The people of Georgia had a right under the power reserved by the Tenth Amendment to define a "republican form of government."**

By the language of the Georgia Constitution quoted in division 5 of this argument, the people of Georgia have defined a "republican government" in language which unmistakably shows an intent that the taxing power shall be extended as broadly as the Federal system permits.

It is also our opinion that the clauses of the Georgia Constitution requiring the taxation of all property which are analyzed in the third division of this argument when construed with the section now under consideration show an unmistakable intent of the framers of the Constitution of Georgia that no property which the State has jurisdiction to tax shall escape its just share of the burdens of government.

In the motion for rehearing filed in the Supreme Court of Georgia to its decision rendered in this case on January 9, 1947 (T. 188), petitioners urged the point that the Supreme Court of Georgia had built a fence around the sovereign power of the State and left outside the "curtilage" an area which the Court was forbidden to exclude by the fundamental law of the State.

Having defined a "republican government" as related to the power of taxation, the question arises as to whether the right to define this form of government is foreclosed by anything contained in the Federal Constitution itself.

No particular government is designated by Article IV, Section IV of the Constitution of the United States as

"republican," neither is the exact form to be guaranteed in any manner especially designated.

Minor v. Happersett, 88 U. S. 162, supra, **Opinion 175.**

Those features of a republican form of government which have been described by the United States Supreme Court are features which pertain to the political field of government as distinguished from its judicial functions.

Minor v. Happersett, 88 U. S. 162, supra;
Duncan v. McCall, 139 U. S. 449, supra, **Opinion 461.**

None of the decisions cited under the Annotations to Article IV, Section IV of the Constitution of the United States attempt to define a "republican form of government" in respect to the power of taxation nor do they attempt to say whether or not any treatment of the subject of taxation is germane to the question of what constitutes such a government.

The language which we have emphasized above contained in the opinion of Minor v. Happersett, supra, namely, "The guaranty necessarily implies a duty on the part of the States themselves to supply such a government," leads us to believe that the people of Georgia had the right which they exercised to state that in a republican form of government the power of taxation should be co-extensive with the sovereign power of the State.

We have pointed out in this argument that this identical language contained in Georgia's Constitution of 1877 and Georgia's Constitution of 1945 followed by many years an unbroken line of United States Supreme Court decisions upholding this view of the reach of State sovereignty.

While we know of no case where the Federal courts have been called upon to determine the effect of a comparable clause in a State Constitution, we know of no reason why the people of Georgia were forbidden to so define a "republican form of government" and respectfully submit the following cases which are illustrative of powers which have been deemed appropriate for exercise by the States pursuant to the reservation contained in the Tenth Amendment.

There have been many decisions by the Supreme Court of the United States construing this reserved power as related to various powers of government.

As examples of the field of the reserved power which belongs to the States as construed by the United States Supreme Court, we respectfully cite the following:

(a) State laws which prohibit the sale of intoxicating liquor have been upheld under the reserve power of State police regulation.

Bartemeyers v. Iowa, 85 U. S. (18 Wall.) 129, 21 L. Ed. 929.

(b) State laws have been upheld under the reserve power of ~~international~~ internal police which penalized the manufacture of liquor.

Hebert v. Louisiana, 272 U. S. 312, 47 S. Ct. 103, 71 L. Ed. 270, 48 A. L. R. 1102.

(c) State laws have been upheld under the reserve police power which required passenger trains to stop at every town within the State on its line of 3,000 inhabitants.

Lake Shore & M. S. R. Co. v. Ohio ex rel. Lawrence, 173 U. S. 285 (1899), 19 S. Ct. 465, 43 L. Ed. 702.

As examples of the United States Supreme Court's construction of power reserved to the States in the field of taxation, we respectfully cite the following:

(a) A Federal law imposing a tax on grain futures not sold upon "contract" markets was held invalid as in effect an invasion of State reserve power.

Illinois v. Wallace, 259 U. S. 44, 42 S. Ct. 453, 66 L. Ed. 822.

(b) A Federal law imposing an excise tax on the profits of factories, etc., in which child labor was employed was held invalid as in effect an invasion of the reserve power of the State.

Child Labor Case (Bailey v. Drexel Furniture Company), 259 U. S. 20, **Opinion 36, 38,** 42 S. Ct. 449, 66 L. Ed. 817, 21 A. L. R. 1432.

(c) A Federal law imposing a tax on coal of 15% of the sale price at the mine with a drawback of 90% thereof to members of the Coal Code was held invalid as an invasion of the State's reserve power.

Carter v. Carter Coal Company, 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160.

(d) A Federal processing tax on the first processing of agricultural commodities, the same to be used for payments to farmers agreeing to a reduction of acreage or production, was held invalid as an invasion of the reserve power of the States.

United States v. Butler, 297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 102 A. L. R. 914.

As miscellaneous examples of the United States Supreme Court's construction of the relation between powers

granted to the Federal government and powers reserved to the States, we cite the following:

(a) The Civil Rights Act of 1875 which penalized (Sections 1 and 2) any person depriving another of equal accommodations at inns, etc. being unsupported by the Thirteenth or Fourteenth Amendments, was held invalid as an invasion of reserve powers of a State.

Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835.

(b) The State Liquor Prohibition laws (not inconsistent with the Eighteenth Amendment) derived their force not from that amendment but from power originally belonging to the States and reserved to them by the Tenth Amendment.

McCormick and Co. v. Brown, 286 U. S. 131, 141, 52 S. Ct. 522, 76 L. Ed. 1017, 87 A. L. R. 448.

(c) The Home Owners' Loan Act (48 Statutes 128) to the extent that it permitted the conversion of a state building and loan association into a Federal savings and loan association without consent of the State, was held to be an unconstitutional encroachment upon the reserve power of the States.

Hopkins Federal Savings and Loan Ass'n v. Cleary, 296 U. S. 315, 56 S. Ct. 235, 80 L. Ed. 251, 100 A. L. R. 1403.

(d) The Act of 1916 (39 Statutes 675) prohibiting shipment in interstate commerce of products of mills, etc. in which child labor had been employed within thirty days of removal of goods was held invalid on the ground that it went beyond the commerce power and invaded the reserve power of the States.

Hammer v. Dagenhart, 247 U. S. 251, 38 S. Ct. 529, 62 L. Ed. 1101, 3 A. L. R. 649, Ann. Cases 1918 E. 724.

In our opinion, the question here presented as to whether the Supreme Court of the United States has jurisdiction over Article IV, Section IV of the United States Constitution to protect a "republican form of government" as defined by a State Constitution is a question of first impression in this Court. We respectfully invoke the Federal Court's jurisdiction under Article IV, Section IV of the Federal Constitution as an additional reason why certiorari should be granted in this case.

8.

**The decision of Georgia's Supreme Court ignores the distinction between tangible and intangible property.**

"Credits" are recognized in Georgia as a species of property separate and distinct from "notes." "Notes" are only evidence of intangible property. "Credits" constitute the property itself.

> Suttles v. Northwestern Mutual Life Insurance Company, 193 Ga. 495, **Opinion 507**, 19 S. E. 2d 396, **Opinion 404**.

The tax assessors in Paragraph 7 of their original answer (T. 55) affirmatively pleaded that the "credits represented by said notes * * * were and are taxable in Fulton County, Georgia."

As was said by the Supreme Court of the United States in the case of Curry v. McCanless, 307 U. S. 357, **Opinion 366**, 59 S. Ct. 900, **Opinion 905, Col. 1**, 83 L. Ed. 1339:

> "(Intangible) rights are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in the courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing.

> They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights."

## CONCLUSION.

In a case where the services of a local agent were less instrumental in the making of loans than the services of Penn Mutual's salaried Loan Supervisor, the United States Supreme Court affirmed the judgment of a Federal court holding that a non-resident mortgage company was not entitled to maintain a foreclosure suit contrary to Alabama's statute which established certain requirements for non-resident corporations doing business in the State of Alabama.

> Chattanooga National Building and Loan Association v. Denson, 189 U. S. 408, 47 L. Ed. 870, 23 S. Ct. 630.

Considering the standards for taxability, as clearly outlined in controlling decisions cited in this brief, it is difficult to conceive that the Court might possibly hold that a non-resident mortgage company is not subject to the taxing power of the State while at the same time holding that the same non-resident mortgage company is subject to suit within the State.

It became apparent following the decision of this Penn Mutual case in the State Supreme Court that the State court would not permit the taxation of the credits secured by real estate of any other non-resident company unless the facts were almost identical, in their minute details, with the facts of the Northwestern Mutual case.

As we read the decisions of the United States Supreme Court which are cited in this brief, we are convinced that the Supreme Court of Georgia has misinterpreted United

States Supreme Court decisions relative to the taxing power of the States and that the rule of decisions recently established by the Supreme Court of Georgia is discriminatory and in disregard of the State's constitutional definition of a republican government.

The tax officials of Fulton County are powerless to continue their effort to eliminate discrimination in the assessment and collection of taxes unless the Court grants certiorari in this case.

This May 2, 1947.

Respectfully submitted,

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